No. 87-1554

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

In re:

48th STREET STEAKHOUSE, INC.,

Debtor.

ROCKEFELLER GROUP, INC. and
ROCKEFELLER CENTER PROPERTIES,

Petitioners,

-against-

48th STREET STEAKHOUSE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Congress intended the Chapter 11 automatic stay provisions of the Bankruptcy Code (11 U.S.C. § 362) to be literally construed, as was done by the Courts of Appeals for the First, Fourth, Fifth, Sixth and Seventh Circuits, or to be expanded, as was done by the Courts of Appeals for the Second and Ninth Circuits, to prohibit acts not directed against a bankrupt or its property.

2. Whether the scope of the Chapter 11 automatic stay ought to be broadened to include acts that are inherently incapable of obtaining possession of property of, or from, a debtor.

PETITIONERS' LISTING PURSUANT TO RULE 28

Rockefeller Center Properties
Rockefeller Group Capital Corporation
Rockefeller Group International Finance N. V.
Rock-McGraw, Inc.
Brumas Pembroke, Inc.
Night Watch Realty Corp.
Radio City Music Hall Productions, Inc.
New Jersey Foreign Trade Zone Venture
Rockefeller Group-Delaware, Inc.
Rockefeller Group Growth Funding, Inc.
Rockefeller Group-Wilmington, Inc.
Cushman & Wakefield, Inc.
Dukbee, Thorn & Co.
C & W Operating, Inc.
C & W Realty Capital Corporation
Cushfield, Inc.
Cushfield Maintenance Corp.
C & W Property Maintenance of Hawaii, Inc.
Cushfield Maintenance West Corp., Inc.
Cushman & Wakefield of Alabama, Inc.
Cushman & Wakefield of Arizona, Inc.
Cushman & Wakefield of California, Inc.
Cushman & Wakefield of Colorado, Inc.
Cushman & Wakefield of Connecticut, Inc.
Cushman & Wakefield of Florida, Inc.
Cushman & Wakefield of Georgia, Inc.
Cushman & Wakefield of Hawaii, Inc.
Cushman & Wakefield of Hong Kong, Inc.
Cushman & Wakefield of Illinois, Inc.
Cushman & Wakefield of Indiana, Inc.
Cushman & Wakefield of Kentucky, Inc.
Cushman & Wakefield of Long Island, Inc.

PETITIONERS' LISTING PURSUANT TO RULE 28 (continued)

Cushman & Wakefield of Maryland, Inc.
Cushman & Wakefield of Massachusetts, Inc.
Cushman & Wakefield of Michigan, Inc.
Cushman & Wakefield of Mississippi, Inc.
Cushman & Wakefield of New Jersey, Inc.
Cushman & Wakefield of North Carolina, Inc.
Cushman & Wakefield of Ohio, Inc.
Cushman & Wakefield of Oklahoma, Inc.
Cushman & Wakefield of Oregon, Inc.
Cushman & Wakefield of Pennsylvania, Inc.
Cushman & Wakefield of Puerto Rico, Inc.
Cushman & Wakefield of Tennessee, Inc.
Cushman & Wakefield of Texas, Inc.
Cushman & Wakefield of Virginia, Inc.
Cushman & Wakefield of Washington, Inc.
Cushman & Wakefield of Washington, D. C., Inc.
Cushman & Wakefield National Corporation
Cushman & Wakefield Realty Advisors, Inc.
Cushman & Wakefield Western, Inc.
Building Programs, International, Inc.

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October Term, 1987

In re:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 835 F.2d 427 and is reprinted as Appendix A (App. 1a - 10a) to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 15, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition concerns the construction and application of 11 U.S.C. §§ 362(a)(3) and 1301(a):

11 U.S.C. § 362(a)(3) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of

* * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C. § 1301(a) provides:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless-

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under Chapter 7 or 11 of this title.

STATEMENT OF THE CASE

In 1967, petitioner Rockefeller Group, Inc., ("RGI")[1] rented ground floor space ("premises") located at 10 Rockefeller Plaza to Charley O's Corp., a subsidiary of Restaurant Associates, Inc. ("Restaurant Associates"), for a term expiring in 1980. The premises were used by Charley O's Corp. for a restaurant known as Charley O's until 1976 when Restaurant Associates sold Charley O's and another restaurant to Peter Aschkenasy and Jack B. Levine, who were then the principals of respondent, a corporation they formed to operate Charley O's.

The sale to respondent was effected as follows:

---

[1] RGI was then known as Rockefeller Center, Inc.

a) without releasing Charley O's Corp. from its lease obligations, RGI granted to respondent a new lease to the premises with a term expiring in 1994 ("lease");

b) respondent assigned the lease to another subsidiary of Restaurant Associates, I.S.H. Liquidating Corp. ("I.S.H.");

c) RGI consented to the assignment and agreed to accept respondent as the prime tenant upon receipt of a duly executed reassignment agreement in a prescribed form;

d) I.S.H. and respondent executed a reassignment agreement in the appropriate form and a sublease with consent pursuant to which installments of the restaurant purchase price were due as subrent;

e) however, instead of making the reassignment effective by delivering it to respondent, I.S.H. deposited the instrument with Dornbush, Mensch and Mandelstam ("DMM"), a law firm, to be held in escrow until respondent had performed its obligations to I.S.H. as purchaser of Charley O's; and,

f) Restaurant Associates caused respondent to be put into possession of the premises.

Thus, immediately after these transactions and until well into 1983, respondent was I.S.H.'s subtenant in possession of the premises. If respondent were to default in the payment of the purchase price, I.S.H. could, because these payments were due as subrent, evict respondent and recover the restaurant. On the other hand, if respondent satisfied its purchase price obligations over the term of the sublease, it could become the prime tenant by obtaining the reassignment from escrow and delivering it to RGI.

Notwithstanding the suggestion of the lower courts (App 34a and 13a) that RGI "intended" the transactions among

respondent, I.S.H. and DMM to be a collateral security arrangement, it is clear from the documents themselves that this was not the case. For although the assignment/sublease assignment-in-escrow scheme may indeed be described as a means of collaterally securing an obligation, RGI was not the secured party -- I.S.H. was -- and for this reason RGI's actual intent -- if it could have had any -- with respect to Restaurant Associates' collateralization of the amount owed by respondent for Charley O's, was immaterial. Consonant with this is the fact that RGI was not a participant in, nor privy to, any of the dealings between Restaurant Associates and respondent. Rather, its knowledge of the deal was limited solely to the assignment with consent and consent to sublease -- the only documents involved in the sale by Restaurant Associates that RGI saw until several years after the transaction.

It can accordingly be said that RGI's sole interest in the transactions between Restaurant Associates and respondent was as landlord. In consenting to a sublease and future reassignment, RGI simply gave respondent a 14 year term in the premises at a higher rent and retained a Restaurant Associates entity as an obligator on the lease until at least 1980, the end of Charley O's Corp.'s original term. RGI made no advances of cash or property that needed to be secured and could look only to the remedies generally available to a landlord in case of the non-payment of rent or other lease breaches.

By the time respondent filed a Chapter 11 petition on July 22, 1983, I.S.H. owed RGI substantial back rents, and the reassignment lay in escrow.

On August 1, 1983, American Hospitality Management Co., a co-debtor in respondent's reorganization proceedings, tendered an insufficient payment to RGI on account of respondent's use and

occupation of the premises. RGI rejected this tender in accordance with New York law on the separate grounds that acceptance might be deemed (i) an attornment to a stranger[2] -- only I.S.H. and respondent had the right to pay rent under the lease and consent to sublease -- and (ii) an accord and satisfaction on its entitlement to the full amount of rent due.

Because respondent had no obligation whatsoever to RGI for rent -- privity of both contract and estate between RGI and I.S.H. remained unbroken and under the consent to sublease it was respondent's privilege[3] rather than duty to pay rent -- RGI proceeded against I.S.H. by demanding, in a letter sent on August 26, 1983, that I.S.H. make good the rent arrearage.

Upon I.S.H.'s failure to comply, RGI sent to I.S.H., on the morning of September 1, 1983, a letter terminating the lease.

Although these letters were sent to a non-bankrupt party, and, as a matter of substantive law, could not, in and of themselves, have combined to eliminate whatever interest respondent had in the lease or in the premises, the Second Circuit Court of Appeals found that (App. 9a) RGI's actions violated the Banckruptcy Code's automatic stay against acts to obtain possession of property of or from a debtor (11 U.S.C. § 362). As set forth, *infra*, this

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2 *See, e.g., 305 Broadway Company v. Stanpud Operating Corp.*, 48 Misc.2d 95, 264 N.Y.S.2d 327 (Civ. Ct. N.Y. Co., 1965) (only a tenant may tender rent).

3 A concession obtained by respondent from RGI in order to protect itself in the event of default by I.S.H. *See, generally, 305 Broadway Company v. Stanpud Operating Corp., supra*, discussing the general principles that, absent an express agreement to the contrary, a subtenant has no right to cure its sublandlord's defaults and the prime landlord has no cause of action against a subtenant for rent.

determination expanded the purview of the automatic stay to what were hitherto clearly permissible acts.

After the sending of the termination letter, respondent commenced an adversary proceeding against RGI, petitioner Rockefeller Center Properties ("RCP," a partnership to which RGI had contributed the lease), I.S.H. and DMM in Bankruptcy Court to, among other things: a) enjoin petitioners from taking any steps respecting respondent's interest in the lease; (b) compel RGI to accept respondent's rent tenders; and, c) declare respondent to be the prime tenant under the lease. Petitioners answered and counterclaimed for dismissal of respondents Chapter 11 proceeding as having been filed in bad faith.

On the afternoon of September 1, 1983, respondent moved by order to show cause signed by Bankruptcy Judge Edward J. Ryan for: a) leave to assume the lease pursuant to 11 U.S.C. §365; b) a finding that petitioners were in contempt for violating the automatic stay; and, c) a declaration that respondent had the right to make rent payments under the lease.

Inter alia, Judge Ryan's order enjoined petitioners from proceeding against respondent "with regard to the lease or the premises." Petitioners' subsequent motion to lift this injunction on the ground of respondent's violation of sanitary codes was denied as moot by Judge Ryan on January 3, 1984. Appeals from this order were denied by Judge MacMahon in orders dated January 29, 1985 and July 12, 1985 (46 B.R. 227). By stipulation, appeals from these orders are being held in abeyance pending the determination of this matter.[4]

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[4] Debtor, I.S.H. and DMM thereafter resolved their differences, the reassignment was released from escrow and I.S.H. and DMM were dropped as defendants in the case.

In June, 1985, respondent moved for summary judgment before Hon. Tina L. Brozman, U.S.B.J., who had succeeded Bankruptcy Judge Ryan on the case; petitioners cross-moved for partial summary judgment declaring that respondent is not the prime tenant under the lease.

While this motion was *sub judice*, petitioners learned, from documents they had obtained from the plaintiffs in a RICO action against respondent's principals, of various transactions that might preclude the assumption of the lease by respondent because they violated the consent to sublease. Chief among these deals was the transfer by Messrs. Aschkenasy and Levine of their stock in respondent. Before any evidence was submitted in this connection, Judge Brozman, by decision and order (App. 16a - 36a) dated May 22, 1986 (61 B.R. 182), granted the main motion and denied the cross-motion on two separate theories: a) that the assignment of the lease by respondent to I.S.H. was collateral security rendering the lease property of respondent's bankruptcy estate and subject to the protection of the automatic stay; and, b) that the sublease was property of the estate and that RGI's letter, although directed only against I.S.H. and the lease, violated the automatic stay.

By memorandum and order dated March 19, 1987 (App. 11a - 15a) Hon. Kevin T. Duffy, U.S.D.J., summarily affirmed. Respondent then commenced, before Bankruptcy Judge Brozman, a new adversary proceeding against petitioners, their in-house attorney and their former litigation counsel seeking $7,000,000 in damages allegedly arising from the sending of the termination letter and the interposition of a defense and counterclaim to the original adversary proceeding.

The Second Circuit Court of Appeals affirmed the District Court decision (835 F.2d 427; App. 1a - 10a), but only upon the second theory given by Bankruptcy Judge Brozman, noting, *id.* at 430, that the finding of fact supporting the first theory was "inappropriate" on a motion for summary judgment.

Because, as set forth, *infra*, the decision of the Second Circuit stretches the application of the automatic stay to unprecedented limits for which there is no foundation in the language or intent of the statute, and because the decision is in conflict with the determinations of five Circuit Courts of Appeals, the writ should be granted.

REASONS FOR ALLOWING THE WRIT

This case presents a perfect opportunity for the Court to prescribe the outermost limits of the "automatic stay" provisions of the 1978 Bankruptcy Code, 11 U.S.C. § 101, *et seq.* The Second Circuit's determination that sending a letter to a non-bankrupt party violated 11 U.S.C. § 362 reached well beyond the letter and spirit of the law. If allowed to stand, it will have far reaching effects on the real estate industry and the courts by constraining landlords to petition the Bankruptcy Courts to lift the automatic stay affecting bankrupt subtenants before they may invoke their lease rights against solvent prime tenants.

The Second Circuit's decision and a decision of the Ninth Circuit upon which it relied to hold that the automatic stay can protect a non-bankrupt party and its property are in direct conflict

with the earlier decisions of the First, Fourth, Fifth, Sixth and Seventh Circuits as well as the majority of lower court authorities.

The court has not yet ruled on the questions presented in this petition.

I.

A. The Second Circuit's Construction of 11 U.S.C. § 362(a)(3) was Overbroad in its Expansion of the Scope of the Automatic Stay in Bankuptcy to Acts Taken Against a Non-Bankrupt Party or its Property

B. The Construction of 11 U.S.C. § 362 Adopted by the Courts of Appeals for the Second and Ninth Circuits is in Direct Conflict With the Construction Adopted by the Courts of Appeals for the First, Fourth, Fifth, Sixth and Seventh Circuits

A.

The Second Circuit's conclusion that sending a letter terminating a non-bankrupt tenant's lease violates the automatic stay protecting the estate of a bankrupt subtenant has no basis in the wording of the 11 U.S.C. § 362(a)(3) or its legislative history.

Pursuant to that statute, cited by the Second Circuit as authority for its holding, a Chapter 11 petition operates to stay "any

act to obtain possession of property of *the estate* or of property from *the estate* or to exercise control over property of *the estate*." (Emphasis added.) Although the statute by its unambiguous terms is limited to acts designed to obtain property belonging to, and held by, a party other than a Chapter 11 debtor, the Second Circuit ruled that it extends even to a non-debtor.

Examination of the legislative history of § 362, S. Rep. No. 95-989, 95th Cong., 2d Sess. 54-55 (1978), *repr. in* [1978] *U.S. Code Cong. & Admin. News* 5687, 6297 and H.R. Rep. No. 95-595 95th Cong., 2d Sess. 340 (1978), *repr. in U.S. Code Cong. & Admin. News*, p. 6297, 1978, does not show any intent on the part of its framers to have § 362(a)(3) broadly construed. Indeed, as set forth below, five Circuit Courts of Appeals have concluded from the precise and deliberate wording of 11 U.S.C. § 362 and related provisions of the Bankruptcy Code that Congress manifestly intended not to include a non-bankrupt within the scope of the automatic stay and for the statute to be construed literally.

B.

In *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir., 1983), *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 125 (4th Cir., 1983), *Wedgeworth v. Fibreboard Corporation*, 706 F.2d.541 (5th Cir., 1983), *Lynch v. Johns Manville Sales Corporation*, 710 F.2d. 1194 (6th Cir., 1983) and *Pitts v. Unarco Industries, Inc.*, 698 F.2d. 313 (7th Cir., 1983), each Circuit Court first considered and then rejected the broad interpretation of 11 U.S.C. § 362 embraced by the Second Circuit and by the Ninth Circuit in *In re Bialac*, 712 F.2d. 426 (9th Cir., 1983). The five Circuit Courts carefully compared the language of §

362 to that of the automatic stay provision of Chapter 13 of the Bankruptcy Code (11 U.S.C. § 1301), which expressly extends the stay to certain non-bankrupt parties, and concluded that the omission of similar language from § 362 was intentional. As Chief Judge Coffin observed: [H]ad Congress intended § 362(a) to apply to solvent [parties], it would have said so." *Austin v. Unarco, supra*, at 4.

Nor is there any intimation that Congress, in enacting the Bankruptcy Code in 1978, intended anything more than to simply recodify the automatic stay provisions of prior law, which were never thought to apply to a non-bankrupt party, *see, e.g., in re Holiday Lodge*, 300 F.2d. 516 (7th Cir., 1962), *cert. den.*, 371 U.S. 824 (1962), even where an act directed against a non-bankrupt, such as the foreclosure of its mortgage, of necessity would destroy the bankrupt's property, such as a lease subordinate to a mortgage. This interpretation of the pre-1978 automatic stay was carried over by the courts to § 362, *see, e.g., Juneau's Builders Center, Inc. v. First National Bank of Gonzales (in re Juneau's Builders Center Inc.)* 57 B.R. 254 (Bkcy., M.D. La., 1986), and only the Second and Ninth Circuits have abandoned it.

By so doing, these two Courts have effectively required any landlord seeking to terminate a non-bankrupt tenant's lease or a mortgagee seeking to foreclose a non-bankrupt partnership's mortgage to first make a motion to lift the automatic stay applicable to: a) any of the several bankrupt subtenants or tenants who may be present in a shopping center, office building or apartment house; and/or, b) any bankrupt member of the mortgagor partnership.

CONCLUSION

In order finally to construe 11 U.S.C. § 362, resolve a division among seven Circuit Courts of Appeals and determine whether the Bankruptcy Courts should be inundated with motions to lift the automatic stay as a condition precedent to State court foreclosure and lease termination actions, the writ should be granted.

Dated: New York, New York
March 9, 1988

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 199—August Term, 1987

(Argued: October 6, 1987 Decided: December 15, 1987)

Docket No. 87-5016

In re 48th STREET STEAKHOUSE, INC.,

Debtor.

48th STREET STEAKHOUSE, INC.,

Plaintiff-Appellee,

—v.—

ROCKEFELLER GROUP, INC., and
ROCKEFELLER CENTER PROPERTIES,

Defendants-Appellants,

I.S.H. LIQUIDATING CORP. and
DORNBUSH MENSCH & MANDELSTAM,

Defendants.

IN RE 48TH STREET STEAKHOUSE, INC.

Before:

LUMBARD and ALTIMARI, *Circuit Judges*, and KAUFMAN, *District Judge.**

Appeal from an order of the United States District Court for the Southern District of New York (Duffy, J.), affirming grant of summary judgment by the Bankruptcy Court for the Southern District of New York (Brozman, J.) on the ground that appellants' sending of a lease termination notice to I.S.H. Liquidating Corp. was in violation of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362.

Affirmed.

PAUL I. MARX, New York, N.Y. (Angel & Frankel, P.C., Bruce Frankel and Peter S. Goodman, New York, N.Y., of Counsel), *for Plaintiff-Appellee.*

HENRY J. BERGMAN, New York, N.Y. (Bachner, Tally, Polevoy, Misher & Brinberg, of Counsel), *for Defendants-Appellants.*

* Honorable Frank A. Kaufman, Senior Judge of the United States District Court for the District of Maryland, sitting by designation.

ALTIMARI, *Circuit Judge*:

Appellants, Rockefeller Group, Inc. and Rockefeller Center Properties ("the Landlord"), appeal from a decision of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, Judge, which affirmed a grant of summary judgment in favor of 48th Street Steakhouse, Inc. ("48th Street") by the United States Bankruptcy Court for the Southern District of New York, Tina L. Brozman, Bankruptcy Judge. Judge Brozman held that appellants' act of sending a lease termination notice to I.S.H. Liquidating Corp. ("I.S.H."), to which 48th Street's lease had been assigned, was in violation of 48th Street's right to an automatic stay under section 362 of the Bankruptcy Code, 11 U.S.C. § 362. We agree with this conclusion and we affirm the decision of the district court.

BACKGROUND

In November 1975, 48th Street contracted to purchase a restaurant business located at 10 Rockefeller Plaza, New York City, from Charley O's Corp. ("Charley O's"). The agreement of sale provided for the purchase by 48th Street of Charley O's furniture, fixtures and equipment located at the premises, and the right to use the name "Charley O's." Charley O's had been leasing the premises from Rockefeller Center, Inc. (later re-named Rockefeller Group, Inc.), which terminated its lease with Charley O's and entered into a new lease with 48th Street. 48th Street's lease was dated December 1975, but was not executed until April 1976; the lease term was to expire on September 30, 1994.

In order to finance its purchase of the restaurant, 48th Street executed a promissory note in the amount of $207,289.00, which evidenced its obligation to Charley O's. Charley O's secured this obligation by obtaining a security interest in 48th Street's chattels, fixtures and equipment. In addition, 48th Street assigned its lease of the premises to I.S.H., an affiliate of Charley O's, thus rendering I.S.H. the nominal prime tenant under the lease. The Landlord consented to this assignment.

Paragraph 6 of the assignment provided that the Landlord would consent to the future reassignment of the lease back from I.S.H. to 48th Street "whenever requested by the Assignee and the Assignor." Such reassignment was to be requested by means of a document entitled "Assignment with Consent and Release." This document provided that the lease was to be reassigned to 48th Street as soon as 48th Street had satisfied all its financial obligations to Charley O's. The "Assignment with Consent and Release" was to be held in escrow until such time as 48th Street's debt to Charley O's was satisfied.

After 48th Street assigned its lease to I.S.H., I.S.H. in turn sub-let the premises to 48th Street, with the Landlord's consent. The sub-lease was coterminous with the escrow agreement, in that it would also terminate upon the satisfaction of 48th Street's debt to Charley O's. 48th Street remained in continuous possession of the premises and pursuant to the terms of the sublease, paid rent directly to the Landlord.

In July of 1983, rent on the restaurant premises was in arrears. That same month, 48th Street and its parent corporation, American Hospitality Management Co. ("American Hospitality"), filed Chapter Eleven bankruptcy petitions. On August 1, 1983, American Hospital-

ity tendered a payment to Landlord on behalf of 48th Street for use and occupation of the premises for the post-petition period of July. That tender was rejected.

In late August 1983, Landlord served I.S.H., the nominal prime tenant, with a notice of default which stated that if the arrears were not paid within five days, Landlord would terminate the lease. I.S.H. did not pay the requested arrears.

48th Street was served with a copy of the default notice and immediately acted to protect its interest in the lease by commencing the instant adversary proceeding on September 1, 1983. 48th Street's complaint requested, among other relief, that the Landlord be enjoined from taking any action with respect to 48th Street's interest in the lease, and that 48th Street be declared the prime tenant under the lease.

That same day, a hearing was held before Bankruptcy Judge Ryan, at which it was learned that the Landlord had already sent a notice of lease termination to I.S.H. dated September 1, 1983. The notice advised I.S.H. that because the arrears had not been paid within five days of the previous default notice, the lease was to be terminated in three days. Following the September 1 hearing, Judge Ryan issued a preliminary injunction which enjoined the Landlord "from interfering with and/or terminating any right, title and interest that the Debtor may enjoy with regard to the lease or premises." This injunction served to stay the effect of the lease termination notice.

In June 1985, 48th Street moved for summary judgment, arguing that the Landlord's sending of the lease termination notice violated the automatic stay provision of the Bankruptcy Code. 48th Street requested a declara-

tion that the lease termination notice was ineffective, and that "upon the payment of all arrears due and owing under the . . . Lease and/or Sublease, 48th Street will be the prime tenant under the Lease."

On May 22, 1986, Bankruptcy Judge Brozman issued a decision and order granting 48th Street's motion for summary judgment. *See* 61 B.R. 182 (Bankr. S.D.N.Y. 1986). Judge Brozman held that the 48th Street lease constituted property of the bankrupt estate under 11 U.S.C. § 541, and therefore, the Landlord's attempt to terminate the lease as to I.S.H. violated 48th Street's right to an automatic stay of "any act to obtain possession of property of the estate." 11 U.S.C. § 362(a)(3).

The Landlord appealed Judge Brozman's decision to the District Court for the Southern District of New York, which affirmed the grant of summary judgment in favor of 48th Street.

DISCUSSION

Throughout this litigation, the Landlord has maintained that I.S.H. was its prime tenant and that 48th Street's only interest in the lease was that of a sublessee. 48th Street, on the other hand, argues that the assignment of its lease to I.S.H. was intended as collateral, and that 48th Street therefore retained an equitable interest in the lease which was greater than that of a sublessee. Judge Brozman held that even if 48th Street was a "mere sublessee," its interest in the lease would still be protected by the automatic stay because a sublease constitutes property of the bankrupt estate. Judge Brozman then went on to make what appears to be a factual finding

that, in any event, the assignment of 48th Street's lease to I.S.H. was indeed intended as collateral.

Because this case came to the court on a motion for summary judgment, however, such fact-finding was inappropriate. On a motion for summary judgment, the court must view the facts and draw all reasonable inferences therefrom in the light most favorable to the non-moving party. *See, e.g., Knight v. U.S. Fire Insurance Co.*, 804 F.2d 9, 10-11 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987). Accordingly, for the purpose of this appeal, we accept the Landlord's contention that I.S.H. was its prime tenant, and that 48th Street was a sublessee following the assignment of its lease to I.S.H. We then must consider whether a sublease constitutes property of the bankrupt estate and whether the Landlord's sending of a termination notice to I.S.H. violated the automatic stay with respect to 48th Street.

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, enumerates the types of property interests which are included in the bankrupt estate. The estate is defined broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* § 541(a)(1).

The courts are in agreement that unexpired leasehold interests, including subleases, constitute property of the bankrupt estate. *See, e.g., In re American International Airways, Inc.*, 44 B.R. 143, 145 (Bankr. E.D. Pa. 1984); *In re KDT Industries, Inc.*, 32 B.R. 852, 856 (Bankr. S.D.N.Y. 1983); *In re Allan Steaks Corp.*, 22 B.R. 881, 882 (Bankr. D. Mass. 1982); *In re Andorra Meat Market, Inc.*, 7 B.R. 744, 745-46 (Bankr. E.D. Pa. 1980). *See also* H.R. Rep. No. 595, 95th Cong., 2d Sess. 367, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6323; S.

Rep. No. 989, 95th Cong., 2d Sess. 82, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5868 ("debtor's interest in property also includes 'title' to property, which is an interest, just as are a possessory interest, or leasehold interest").

Indeed, a mere possessory interest in real property, without any accompanying legal interest, is sufficient to trigger the protection of the automatic stay. *See, e.g., In re Onio's Italian Restaurant Corp.*, 42 B.R. 319, 320-21 (Bankr. S.D.N.Y. 1984); *Matter of GSVC Restaurant Corp.*, 3 B.R. 491, 494 (Bankr. S.D.N.Y.), *aff'd* 10 B.R. 300 (S.D.N.Y. 1980).

Section 362(a)(3) of the Bankruptcy Code stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The Landlord maintains that its sending of the termination notice to I.S.H. did not violate the automatic stay with respect to 48th Street, because termination of I.S.H.'s lease would have had no effect on 48th Street's sublease.

In this contention, the Landlord is simply wrong. As Judge Brozman observed, "it is axiomatic that, under New York law, when a prime lease falls, so does the sublease." 61 B.R. at 189 (citing 34 N.Y. Jur. *Landlord & Tenant* § 270 (1964), and *In re Shopper's Paradise, Inc.*, 8 B.R. 271, 275 (Bankr. S.D.N.Y. 1980)). *See also World of Food, Inc. v. N.Y. World's Fair*, 22 A.D.2d 278, 280, 254 N.Y.S.2d 658, 661 (1st Dep't 1964); *Levchuk v. Briksza*, 126 Misc.2d 369, 371-72, 481 N.Y.S.2d 998, 1000-01 (Civ. Court N.Y. Co. 1984).

The Landlord asserts that the foregoing proposition is not uniformly correct; rather, it argues, termination of

I.S.H.'s lease would have resulted in a "merger" between the estates of Landlord and I.S.H., while leaving 48th Street's sub-lease unimpaired. The cases which Landlord relies upon to support this theory, however, involved instances where the prime tenant surrendered its lease to the landlord pursuant to a separate agreement. *See e.g., Metropolitan Life Ins. Co. v. Hellinger*, 246 A.D. 7, 284 N.Y.S. 432 (1st Dep't 1935), *aff'd*, 272 N.Y. 24 (1936); *see also Precision Dynamics Corp. v. Retailers Representatives, Inc.*, 120 Misc.2d 180, 465 N.Y.S.2d 684 (Civ. Ct. N.Y. Co. 1983). These cases do not apply to 48th Street's situation, where the Landlord attempted unilaterally to terminate the prime tenant's lease for non-payment of rent. Under such circumstances, termination of the prime lease results in termination of the sub-lease as well.

Because Landlord's attempt to terminate I.S.H.'s lease, if successful, would have resulted in the destruction of 48th Street's subtenancy, Judge Brozman correctly held that Landlord's termination notice violated the automatic stay with respect to 48th Street and was therefore void. *See* 2 L. King, *Collier on Bankruptcy* § 362.11 (15th ed. 1987) ("actions taken in violation of the stay are void and without effect").

As a result of this holding, the Landlord is precluded from taking action against I.S.H. with respect to the lease, even though I.S.H. itself has not filed for bankruptcy. The Landlord argues that although the automatic stay is designed to preserve the debtor's estate, its protection should not extend to non-bankrupt third parties which are somehow related to the debtor.

While it is true that I.S.H. is an incidental beneficiary of our decision, this result is permissible where a non-debtor's interest in property is intertwined, as in the

present case, with that of a bankrupt debtor. If action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then such action should be barred by the automatic stay. *See In re Bialac*, 712 F.2d 426, 431-32 (9th Cir. 1983) (automatic stay prohibited creditor from foreclosing on property in which debtor had right of redemption, even though property was owned by non-bankrupt individuals); *In re Metal Center, Inc.*, 31 B.R. 458, 462 (Bankr. D. Conn. 1983) ("the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate").

Finally, 48th Street requests that this court impose sanctions on the Landlord for bringing what 48th Street terms a frivolous appeal. Although we believe that the Landlord's position on this appeal is essentially without merit, we do not consider the appeal to be so frivolous or such an abuse of the judicial process as to warrant the imposition of sanctions.

The decision of the district court is hereby affirmed.

APPENDIX B

Memorandum Decision & Order of the United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x----------x

In re

48th STREET STEAKHOUSE, INC.,

Debtor.

x----------x

48TH STREET STEAKHOUSE, INC.,

Plaintiff-Appellee,

-against-

ROCKEFELLER GROUP, INC., ROCKEFELLER CENTER PROPERTIES,

Defendants-Appellants,

-and-

I.S.H. LIQUIDATING CORP. and DORNBUSH MENSCH & MANDELSTAM,

Defendants.

x----------x

86 Civ. 5313 (KTD)

Memorandum Decision & Order

IN RE 48TH STREET STEAKHOUSE, INC.

APPEARANCES:

Bruce Frankel and Ira R. Abel, ANGEL & FRANKEL, P.C., New York City, for Debtor and Debtor in Possession and Plaintiff-Appellee.

William T. Livingston, III, New York City, for Defendants-Appellants.

KEVIN THOMAS DUFFY, D.J.:

Judge Learned hand was a master of the English language and Judge Henry Friendly was a master of legal reasoning. Yet, a combination of the two would have difficulty in figuring out exactly why Rockefeller Group, Inc. and Rockefeller Center Properties have brought this case to this court at this time. The appellant's brief and reply brief are a collection of words positioned so as to be almost totally devoid of meaning. This much is clear: there has already been an appeal in this bankruptcy adversary proceeding, that appeal was decided by Judge McMahon of this court, an appeal to the Second Circuit from Judge McMahon's Order is being held in abeyance, and no matter what happens on this appeal the Rockefeller interests are going to try to reopen the record in the Bankruptcy Court so that there can be another appeal. Of course, one must question the *bona fides* of this mushrooming litigation but there seems to be absolutely no economic benefit to the appellants because of the delay they have engendered. Thus, I am loath to assess sanctions against them at this posture.[1]

Memorandum Decision & Order

IN RE 48TH STREET STEAKHOUSE, INC.

This is an appeal from an Order of Judge Tina L. Brozman of the United States Bankruptcy Court for the Southern District of New York dated May 22, 1986, prohibiting the appellant-landlord from interfering with the possession of certain premises by the appellee-debtor-in-possession. While I have been afforded no help, by way of assignment of error or argument by counsel for the Rockefeller interest, I have reviewed the record to see if there is some basis for this appeal. There is none.

The Order appealed from is affirmed in all respects on the basis of the opinion below.

SO ORDERED.

DATED: New York, New York
March 19, 1987

KEVIN THOMAS DUFFY, U.S.D.J.

FOOTNOTE

1 A short quotation from appellants' brief at page 6, should suffice:

> RGI and RCP omitted to offer proof or argument addressed to their third affirmative defense, that of (loosely) breach of the lease by change in operating control of the debtor, as a tactical decision based on the proof then available. In consequence of investigation following upon the RICO case motions, new evidence has been discovered on this issue also. As soon as is possible, the new evidence discovered will be presented in support of a motion in the bankruptcy court to reopen and rehear the Decision and Order appealled [*sic*] from.
>
> First, however, we must complete this Brief.

The appellants offer no explanation as to why affirmative factual defenses were put forth when appellants had absolutely no proof of the validity of such defenses. From what I can presently glean from the record and without foreclosing further evidence, the appellants are still totally without such proof. This type of baseless issue raising is exactly what Rule 11 is intended to curtail.

APPENDIX C

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In re 48th STREET STEAKHOUSE, INC., Debtor.

48TH STREET STEAKHOUSE, INC., Plaintiff,

v.

ROCKEFELLER GROUP, INC., Rockefeller Center Properties, I.S.H. Liquidating Corp. and Dornbush Mensch & Mandelstam, Defendants.

Bankruptcy No. 83 B 11070 (TLB).
Adv. No. 83-5915A

United States Bankruptcy Court,
S.D. New York.

May 22, 1986.
As Corrected May 28, 1986.

Chapter 11 debtor commenced adversary proceeding claiming that landlord's notice of termination of restaurant premises lease violated automatic stay. On cross motion for summary judgment, the Bankruptcy Court, Tina L. Brozman, J., held that: (1) fact that landlord served notices of termination on assignee of restaurant

premises lease rather than debtor, which had ten-year-old possessory interest in premises and, at minimum, interest of assignor and sublessee, did not insulate landlord from violating automatic stay as to acts to obtain property of the estate or property from the estate, and thus, serving of notices on assignee violated stay, and (2) debtor's assignment of lease to assignee was for collateral purposes, and thus, debtor remained equitable owner of lease.

Debtor's motion for summary judgment granted.

Angel & Frankel, P.C. by Sanford Rosen, Rita Dumain, New York City, for debtor.

William T. Livingston, III, New York City, for Rockefeller Center, Inc and Rockefeller Center Properties.

Finkel, Goldstein & Berzow by Neal Rosenbloom, New York City, for Creditors' Committee.

Dornbush, Mensch & Mandelstam by Dirk S. Roberts, New York City, *pro se* and for I.S.H. Liquidating Corp.

DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT BY PLAINTIFF AND DEFENDANTS ROCKEFELLER CENTER, INC. AND ROCKEFELLER CENTER PROPERTIES

TINA L. BROZMAN, Bankruptcy Judge.

Plaintiff 48th Street Steakhouse, Inc. ("48th Street") is the debtor in possession and owner of a ten year old restaurant located in the prestigious Rockefeller Center area. Defendants Rockefeller Center, Inc. (renamed Rockefeller Group, Inc.) ("RGI") and Rockefeller Center Properties ("RCP") are respectively the managing partner of RCP and the owner of the premises at which 48th Street's restaurant is located (collectively, "the landlord").

Plaintiff and defendants have each moved for summary judgment in an adversary proceeding commenced by 48th Street. At the heart of their controversy is the effectiveness of a post-petition three-day notice of termination served by the landlord on I.S.H. Liquidating Corp. ("ISH"), at least nominally the prime tenant of 48th Street's premises pursuant to an assignment of lease executed by 48th Street in conjunction with its 1975 purchase of the restaurant from an affiliate of ISH. 48th Street urges that the notice of termination was violative of the automatic stay of section 362 of the Bankruptcy Code, 11 U.S.C. § 362 (the "Code"), and thereby inadequate to divest 48th Street of its interest in the premises. The landlord counters that the lease has been terminated such that 48th Street cannot compel the landlord's consent to a reassignment from ISH and therefore cannot assume the lease pursuant to section 365 of the Code.

FACTS

1. Pre-Petition Facts

48th Street purchased its restaurant through a series of transactions which are not unusual to the restaurant business. In November, 1975, 48th Street contracted to buy the restaurant from Charley O's Corp. ("Charley O's"), issuing a promissory note to the seller in the amount to $207,289.00 (the "Note") secured by a lien on 48th Street's chattels, fixtures and equipment. Excluded from the sale was the lease for the premises. 48th Street instead entered into a new lease directly with RGI. That lease, which was dated December 1, 1975 and signed April 7, 1976[1], expires by its terms on September 30, 1994 (the "Lease"). On the same day that the Lease was signed, 48th Street assigned it to ISH pursuant to an Assignment with Consent ("Assignment") dated December 1, 1975, and executed by 48th Street, ISH and RGI. That Assignment did not release 48th Street of its contractual obligations to RGI. Not only did the Assignment not release 48th Street, but the Lease provided that the majority shareholders of 48th Street were not to change during the period of 48th Street's liability to the landlord. Pursuant to paragraph 6 of the Assignment, contained in a rider, RGI also consented to a reassignment of the Lease to 48th Street whenever requested by ISH and 48th Street and upon presentation of a fully executed reassignment, the form for which was annexed as an exhibit. Specifically, paragraph 6 of the Assignment reads as follows:

> (6) Anything herein or in the lease to the contrary notwithstanding, the landlord will consent to the further assignment of the lease by the Assignee [ISH] to the Assignor [48th Street] whenever requested by the Assignee and the Assignor by executing and delivering

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1 Four months elapsed because 48th Street had to obtain approval from the New York State Liquor Authority for the sale of liquor at the restaurant.

> an Assignment with Consent and Release in the form attached hereto as Exhibit A provided that concurrently herewith, such Assignment and Consent and Release is duly executed by the Assignor and the Assignee and the agreement of Restaurant Associates Industries, Inc. [an affiliate of ISH] on the fourth page thereof is duly executed by said Restaurant Associates Industries, Inc.

Unlike the Assignment, the form for this reassignment explicitly released the assignor, here, ISH. At the same time as they executed their Assignment, 48th Street and ISH executed the reassignment which was held in escrow by the law firm Dornbush, Mensch & Mandelstam (the "Dornbush firm"). The escrow, whose terms and conditions were acknowledged in a receipt dated March 24, 1976, was to terminate and the reassignment was to be delivered to 48th Street upon the later of the payment in full of the Note or of all liabilities accruing under the Lease prior to January 1, 1980.[2]

As part and parcel of the transaction, ISH sublet the premises to 48th Street for the period of the escrow. RGI consented, in writing, to the subletting and accepted rent payments directly from 48th Street. In consenting to sublease, RGI required, as in the Lease, that the two major shareholders of 48th Street remain the same, breach of which covenant would revoke RGI's consent. Both the sublease and the security agreement provided that the payments to be made by 48th

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[2] January 1, 1980 was the date on which Charley O's lease would have expired. Restaurant Associates Industries, Inc. guaranteed 48th Street's lease obligations until this date.

Street under the Note constitute additional rent for the use of the subleased premises.

2. *Post-Petition Facts*

On July 22, 1983, when 48th Street filed a voluntary petition under chapter 11 of the Code, it owed substantial rent to the landlord. On August 1, 1983, American Hospitality Management Co. ("American Hospitality"), 48th Street's parent company and co-debtor, tendered to RGI use and occupation for the post-petition period of July. That tender was rejected.[3]

On approximately August 29, 1983,[4] over a month after the bankruptcy case was commenced, the landlord delivered to ISH a written notice of default which provided that in the event that the arrears were not paid within five days, a written notice would follow which would provide that the Lease would be terminated in three days. Soon thereafter, during the morning of September 1, the promised notice followed, a copy going to 48th Street.

In an effort to protect its interests in the Lease, 48th Street commenced an adversary proceeding against RCP, RGI, ISH and the

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3 There may have been a second tender, one month later, which was similarly rejected, but the dispute regarding that alleged tender is not relevant and need not be resolved here.

4 It is not clear from the record whether this notice was delivered on August 29 or August 26, 1983. Defendants' statement pursuant to Rule 3(g) of the Civil Rules for the Southern District of New York ("3(g) statement") admits the correctness of the later date, but their moving papers indicate that the earlier date is the correct one.

Dornbush firm. 48th Street sought to enjoin the landlord from taking any actions respecting 48th Street's Lease and sublease rights, to compel RGI to accept 48th Street's use and occupation payments, and to obtain a declaration that it was the prime tenant under the Lease. Alleging that all Note payments had been made, 48th Street also sought to compel the Dornbush firm to release the reassignment. In the event that the court did not find 48th Street to be the prime tenant, 48th Street sought alternatively a declaration that, upon full payment to ISH to be fixed by the court, 48th Street will become the prime tenant.

48th Street's efforts were not limited to commencement of the adversary proceeding. By order to show cause signed September 1, 1983, 48th Street moved for a) authorization to assume the Lease; b) a finding that the landlord was in contempt for violating the automatic stay; and c) a declaration that 48th Street has the right to make the Lease payments so it may be reinstated as prime tenant under the Lease. Contained in that order to show cause (obtained during the afternoon of September 1 after a hearing on notice to the landlord) was an order enjoining the landlord from "interfering with and/or terminating any right, title and interest that the Debtor may enjoy with regard to the lease or premises." The landlord later sought to vacate this September 1 injunction; the motion was denied by order dated January 3, 1984. Various appellate rulings emanated from the second of the two orders.[5] On January 29, 1985, the district court held that the September 1 injunction was a preliminary one rather than a temporary restraining order, as the landlord had contended, but

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[5] Both orders were entered by Judge Ryan of this court who was assigned the case until his resignation. The first order was never appealed.

granted the landlord's motion for leave to appeal the January 3 order.[6] Eventually the district court affirmed the January 3 order denying the landlord's motion to vacate the September 3 order.[7]

During the pendency of the proceedings before the district court, 48th Street entered into a court-approved settlement of its adversary proceeding against ISH and the Dornbush firm, paving the way for the parties to eventually "put" the reassignment to RGI, unless the Lease has been validly terminated.

THE INSTANT MOTIONS

Pursuant to Fed.R.Civ.P. 56(a) and Fed.R.Bankr.P. 7056, 48th Street seeks summary judgment against the landlord declaring that a) the default and termination notices issued by the landlord were ineffective because they violated the automatic stay provisions of § 362 of the Code; b) alternatively, the September 1, 1983 injunction served to prevent the termination of the Lease such that 48th Street's interest in the Lease and/or sublease has not terminated; and c) upon payment of all arrears due and owing under the Lease and/or sublease, 48th Street will be the prime tenant. The landlord has cross-moved for partial summary judgment declaring that 48th Street is not the tenant under the Lease, has not been a party to the Lease since July 22, 1983 and did not, by filing its petition on that date, invoke any law

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6 *See* Memorandum and Order dated January 29, 1985, Index No. 84 Civ. 1241 (S.D.N.Y., MacMahon, J.).

7 *See* Memorandum and Order dated July 12, 1985, Index No. 84 Civ. 1241 (S.D.N.Y., MacMahon, J.).

that would enjoin or stay the effectiveness of the notices served by the landlord upon ISH.[8]

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[8] In its third cross-claim and counterclaim, the landlord requests judgment declaring the Lease and sublease void or permitting it terminate the Lease and obtain damages because the ownership of 48th Street was allegedly misrepresented, concealed or impermissibly changed. Although the landlord bases its summary judgment motion and its opposition to 48th Street's motion seeking to be declared the prime tenant on the claimed termination of the Lease, it limits its argument for termination to the effectiveness of the termination notice, nowhere raising the grounds for termination or avoidance pleaded in the third counterclaim. Not only are the landlord's motion papers and memorandum of law conspicuously silent with respect to this defense to 48th Street's motion (which was not addressed at oral argument, either), but the landlord's 3(g) statement fails to raise as an undisputed factual issue that the ownership of the debtor was misrepresented, concealed or impermissibly changed.

The very mission of the summary judgment motion is to pierce the pleadings and assess the proof in order to see whether there is a need for a trial. Advisory Committee Note on 1963 amendment to subdivision (e) of Rule 56; *Alithochrome Corporation v. East Coast Finishing Sales Corporation (In re Alithochrome Corporation)*, 53 B.R. 906, 912 (Bankr.S.D.N.Y. 1985). The party opposing a summary judgment motion "may not rest upon mere allegations or denials. Fed.R.Civ.P. 56(e). To avoid summary judgment ... a plaintiff must do more than whet the curiosity of the court; he must support vague accusations and surmise with concrete particulars." *Varon v. Trimble, Marshall & Goldman, P.C. (In re Euro-Swiss International Corporation)* 33 B.R. 872, 878 (Bankr.S.D.N.Y. 1983), quoting *Applegate v. Top Associates*, 425 F.2d 92, 96 (2d Cir. 1970). If evidence is available to underpin a conclusory statement, rule 56 requires the party opposing the motion for summary judgment, which is intended to "smoke out" the facts, to come forward with it. *Donnelly v. Guion*, 476 F.2d 290, 293 (2d Cir. 1972). Thus the third counterclaim need not detain us.

In its fourth counterclaim and affirmative defense, the landlord requests dismissal of 48th Street's petition. The landlord essentially asserts that the bankruptcy filing was made in bad faith in that the debtor is profitable, is productive, was not insolvent at the time it filed its petition and is not likely to become insolvent. The dismissal sections of the Bankruptcy Code 1112(b) and 305(a), require notice and a hearing when a party requests such relief. Federal Rule of Bankruptcy Procedure 2002(a)(5) requires twenty days' notice to, *inter alia*, the debtor and all creditors. The landlord has not given that notice. Thus, the issue is not properly before this court.

48th Street contends that (i) the Assignment was given as collateral to secure its obligations under the Note so that the Lease itself constitutes property of 48th Street's estate protected by the automatic stay; (ii) the sublease is property of the estate protected by the automatic stay; (iii) the September injunction prevented the termination of the Lease; and (iv) 48th Street is free to cure its defaults and thereafter assume the Lease pursuant to section 365 of the Code. In opposition, the landlord argues that the automatic stay did not bar the landlord from terminating the Lease with ISH and that the September injunction did not prevent the termination of the Lease because the three-day notice was mailed prior to the issuance of the injunction.

DISCUSSION

Having read the affidavits and briefs in support of the cross motions and having considered the parties' oral arguments, this court finds that the notices were issued in violation of the automatic stay and that the September injunction served to maintain the status quo of the Lease pending 48th Street's assumption application. Additionally we hold that the Assignment was designed only to serve as collateral for the Note obligation and thus was not a "true lease assignment," such that 48th Street was thereby divested of its interest in the Lease.

1. Automatic Stay Violations

Whether 48th Street's interest in the premises is that of a subtenant, as the landlord urges, or that of an equitable owner, as the

debtor urges, the automatic stay was in any event violated when the landlord served upon ISH and the debtor default and termination notices.

[1-4] Section 362(a)(3) of the Bankruptcy Code operates as a stay against "any act to obtain possession of property of the estate or property from the estate."[9] By virtue of section 541, which is meant to be read broadly, the commencement of a case creates an estate comprising all the debtor's legal and equitable interests. 11 U.S.C. § 541; *see United States v. Whiting Pools*, 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). The estate is not confined to property owned by the debtor, for a leasehold or a mere possessory interest falls within section 541. *Carls v. Bonanza International Development Company (In re Allan Steaks Corporation)*, 22 B.R. 881, 882 (Bankr.D.Mass. 1982) *citing* H.Rep. No. 95-595, 95th Cong. 1st Sess. 367 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 82 (1978). U.S.Code Cong. & Admin.News 1978, p. 5787. That 48th Street's interest is arguably limited to that of a subtenancy is of no consequence since a sublease is sufficient to constitute property of the estate protected by the automatic stay. *See Colonial Village Meat Market Leasing, Inc., v. Andorra Meat Market (In re Andorra Meat Market)*, 7 B.R. 744 (Bankr.E.D.Pa. 1980). Moreover, a mere possessory interest enjoys the protection of the automatic stay. *In re W.A.S. Food Service Corp.*, 49 B.R. 969 (Bankr.S.D.N.Y. 1985); *In re GSVC Restaurant Corp.*,3 B.R. 491, 494 (Bankr.S.D.N.Y. 1980); *aff'd.* 10 B.R. 300 (S.D.N.Y. 1980); *In re Onio's Italian Restaurant Corp.*, 42 B.R. 319 (Bankr.S.D.N.Y. 1984).

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[9] Section 362(a)(3) was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 which amendment is inapplicable here. *See* note 10 *infra*.

[5] That the landlord served the notices on ISH, rather than 48th Street, does not insulate the landlord. Indisputably, the landlord's actions were intended to obtain for it by indirection that which it recognized it could not obtain directly--recapture of the premises in which 48th Street had an interest. But that effort cannot be allowed to succeed, for section 362(a)(3) stays not only acts to obtain "property of the estate" but acts to obtain "property from the estate" and the attempt to wrest possession of property away from a debtor without the imprimatur of the bankruptcy court is therefore proscribed. The legislative history is ample testimony to Congress' intention to protect interests other than fee simple title.

> Paragraph (3) stay any act to obtain possession of ... property from the estate (property over which the estate has control or possession).

H.R. No. 95-595, 95th Cong. 1st Sess. 340-2 (1977); S.R. No. 95-989, 95th Cong. 2nd Sess. 49-51 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5836, 6298.[10] *See also Superior Propane v. Zartun (In re Zartun)*, 30 B.R. 543, 545 (B.A.P. 9th Cir. 1983); *Turbowind v. Post Street Management, Inc.*, 42 B.R. 579 (Bankr.S.D.Cal. 1984).

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10 The Bankruptcy Amendments and Federal Judgeship Act of 1984, not applicable to the instant case, amended the Code to codify this legislative history. Section 362(a)(3) now reads:

> (3) any act to obtain possession of property of the estate or of property from the estate, or to exercise control over the property of the estate.

Since 48th Street had a ten-year-old possessory interest in the premises as well as, at a minimum, the interest of an assignor and sublessee in those premises, 48th Street, necessarily enjoyed the freedom from dismemberment afforded by the automatic stay. And the landlord's actions were therefore violative of the stay. *See A. Dan Chisholm, Inc. v. B.P. Oil Inc. (In re A. Dan Chisholm)*, 57 B.R. 718, 720 (Bankr.M.D.Fla. 1986) ("If defendant's attempt to terminate the leased franchise constituted an act to obtain or to exercise control over the [leased premises] then this action violated the stay injunction").

The landlord makes much of the argument that the automatic stay is not intended to afford injunctive coverage to nondebtor third parties. Although that concept is certainly well grounded, it is not dispositive here. *See Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Pitts v. Unarco Industries, Inc.*, 698 F.2d 313 (7th Dir. 1983); *GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 B.R. 405 (Bankr.S.D.N.Y. 1983), *aff'd*, 40 Bankr. 219 (S.D.N.Y. 1984) (refusing to grant requests of solvent co-defendants of debtor that automatic stay protection extend to them in existing litigation); *Fintel v. State of Oregon (In re Fintel)*, 10 B.R. 50 (Bankr.Or 1981); *Globe Construction Co. v. Oklahoma City Housing Authority*, 571 F.2d 1140 (10th Cir. 1978) (denying requests by debtor's surety for automatic stay protection); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr.E.D.N.Y. 1980) (loan guarantors of debtor not protected); *Bank Center Ltd. v. Papariella (In re Bank Center Ltd.)*, 15 B.R. 64 (Bankr.W.D.Pa 1981) (individual partners not extended automatic stay coverage when partnership was debtor); *but cf. Elemar Associates v. Goldsmith (In re Elemar Associates)*, 3 B.R.Ct.Dec 958

(Bankr.S.D.N.Y. 1977) (individual partners granted injunction protecting their assets so as not to jeopardize reorganization).[11]

In certain unusual circumstances, a third party may gain protection of the stay as an incidental result of the protection afforded estate property. In recognizing this, one court aptly stated:

> Where, however, a debtor and a nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited by the Code .... Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate.

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11 The case of *In re Autobahn Classics, Inc.*, 29 B.R. 625 (Bankr.S.D.N.Y. 1983), upon which the landlord heavily relies, is indistinguishable from the case at bar. In *Autobahn*, the lessor sought to lift the stay to enforce a then existing eviction order against a principal of a debtor corporation and of a debtor partnership. Although it appeared there that the debtors conducted their businesses from the premises, the debtors never had any lease, leasehold interest or other relationship with the lessor nor were the debtors paying rent to the lessor. In fact, at the time the lease was issued, the debtor partnership was not even in existence. In the instant case, 48th Street has an assignment and sublease agreement approved by the landlord and has paid rent directly to the landlord for close to ten years.

But even in *Autobahn*, the lessor sought court approval to lift the automatic stay and did not directly proceed against what was questionably estate property.

Plessey Precision Metals, Inc. v. Metal Center, Inc. (In re Metal Center, Inc.), 31 B.R. 458, 462 (Bankr.D.Conn. 1983).[12] *See also Harsh Investment Corp. v. Bialac (In re Bialac),* 712 F.2d 426, 432 (9th Cir. 1983) ("Neither of these interests are within protections afforded by a literal interpretation of section 362, yet they should be protected by the stay if the purposes of the Act, the orderly disposition of all property in which the debtor has some interest, are to be achieved").

Application of the automatic stay to a debtor/assignor/sublessee in possession is not inconsistent with the line of cases previously cited and offered by the landlord that nondebtor parties are not afforded stay protection. Scrutiny of those cases reveals that in no instance was the *debtor's* property in jeopardy; rather, the relief requested was intended to garner the salutary effect of the automatic stay for a nondebtor entity.[13] But here the peril to the debtor is manifest for it is axiomatic that, under New York law, when a prime

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12 The *Plessey* court properly notes that the stay is subject to the relief provisions under section 362(d). However, the debtor was held to be initially entitled to the stay protection.

13 Recently, a bankruptcy court was faced with an issue similar to the one here. In *Juneau's Builders Center, Inc. v. First National Bank of Gonzales (In re Juneau's Builder's Center, Inc.),* 57 B.R. 254 (Bankr.M.D.La. 1986), the debtor sought damages for a mortgagee's alleged violation of the automatic stay in pursuing a foreclosure action on mortgaged premises of which the debtor was a lessee. The court there found that "[s]ince there was no act or action against the debtor, against property of the debtor, or against property of the estate, there was no violation of the stay". *Id.* at 256 (footnote omitted). In a footnote the court clarified that the foreclosure was not a *per se* stay violation and that it was not then deciding whether "a subsequent eviction without relief from the stay would have constituted a violation of the stay...." *Id.* at fn. 2. It would appear from the decision of the court that the mortgage foreclosure would not affect the debtor's interest in the property.

lease falls, so does the sublease. 34 N.Y. Jur., *Landlord and Tenant* § 270 (1964); *In re Shopper's Paradise, Inc.*, 8 B.R. 271, 275 (Bankr.S.D.N.Y. 1980).

In holding that the automatic stay prohibited the landlord from terminating the Lease, this court has as its only concern the estate's interest in the Lease, which interest, in whatever form, is estate property. That ISH may benefit is a consequence of this court's holding, not a motivation for it. The important goal of the automatic stay, to afford protection to the debtor and its property, should not be sacrificed where its implementation necessarily entails protecting an entity which the stay is not designed to benefit.

[6] Viewing the debtor's interest in the premises as that of an equitable owner because of the argued collateral assignment, the automatic stay was in any event violated when RGI served the notices. This is so because a debtor's assignment of property for collateral purposes does not divest the debtor of all interest in the property. Thus, the automatic stay is triggered. *See State of West Virginia v. Hassett (In re O.P.M. Leasing Services, Inc.)* 21 B.R. 993, 1004 (Bankr.S.D.N.Y. 1982); *First National Bank of Louisville v. Hurricane Elkhorn Coal Corporation II (In re Hurricane Elkhorn Coal Corporation II)*, 19 B.R. 609 (Bankr.W.D.Ky. 1982), *mod.*, 32 B.R. 737 (W.D.Ky. 1983). *aff'd*, 763 F.2d. 188 (6th Cir. 1985); *see also In re M.J. Sales & Distributing Company, Inc.*, 25 B.R. 608 (Bankr.S.D.N.Y. 1982) (in connection with collateral pledged as security for a letter of credit, collateral is still estate property subject to automatic stay); *In re Taslis*, 41 B.R. 47 (Bankr.D.Mass. 1984) (rights are retained in a collateral assignment of a lease by a debtor, i.e., the right of possession as well as the right to discharge the assignment upon payment of the obligation).

Having established that the stay has been violated, it follows without discussion that those acts taken in violation of section 362 are void. *See In re Albany Partners, Ltd.*, 749 F.2d. 670 (11th Cir. 1984); 2 L. King, *Collier on Bankruptcy* § 362.11 (15th ed. 1984) and cases cited therein. thus, the default and termination notices were without effect.[14]

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14 Automatic stay violation aside, the district court has already affirmed the bankruptcy court's refusal to vacate the injunction and has determined that the injunction prevented defendants from terminating 48th Street's interest in the Lease pending a determination of 48th Street's application to assume that Lease. *See* footnotes 6 and 7, *supra*. Unless and until the circuit court of appeals rules otherwise, we assume the continuing validity and effectiveness of the injunction. We note that the injunction appears to have been indisputably intended to prevent the debtor's forfeiture of its interest in the Lease. The minutes of the hearing before Judge Ryan bear out this interpretation of the injunction, Tr. of September 1, 1983 at 7-8, which is in harmony with the well-established principle that "the purpose of a preliminary injunction is to maintain the *status quo ante* pending a full hearing on the merits." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *citing Diversified Mortgage Investors v. U.S. Life Title Insurance Company of New York*, 544 F.2d 571, 576 (2d Cir. 1976); *Triebwasser & Katz v. American Telephone & Telegraph Company*, 535 F.2d 1356, 1360 (2d Cir. 1976).

Because the attempted termination of the Lease via the sending of the termination notice violated the automatic stay, the injunction may have been unnessary, but, in any event, it served to prevent the termination of the Lease. *See generally in re Amber Lingerie, Inc.*, 30 B.R. 736 (Bankr.S.D.N.Y. 1983); *In re Merritt Lumber Co.*, 336 F.Supp. 325 (E.D.Pa 1971) (both courts enjoining cancellation/termination of an insurance contract after the sending of notices analogous to that sent by the landlord here); *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630, 21 N.Y.S.2d 721, 237 N.E.2d 868 (1968); *Lewis v. Clothes Shack, Inc.*, 67 Misc.2d 621, 322 N.Y.S.2d 738 (Sup.Ct. App.T. 1971) (cure permissible up until moment of expiration of three-day notice of termination).

2. *Collateral Lease Assignment*

[7] Recognition of the distinction between "true" real estate leases and so called "financing leases" or "leases intended as security" is not at all new to the bankruptcy arena.[15] *See First National Bank of Chicago v. Irving Trust Co.*, 74 F.2d 263 (2d Cir. 1934); *In re Winston Mills*, 6 B.R. 587 (Bankr.S.D.N.Y. 1980). *See also* Albenda & Lief, *Net Lease Financing Transaction Under the Proposed Bankruptcy Act of 1973*, 30 Bus.Law. 713 (1975). The phraseology of the documents should not be ignored, but the court should examine the economic substance of the transaction to determine whether there is in fact a "true lease." *See In re Cobham Enterprises, Inc.*, 62 B.R. 191 (Bankr.S.D.N.Y. 1986) (Buschman, J.,); *In re Winston Mills*, 6 B.R. at 596-97. In *Winston Mills*, the court had "little difficulty in piercing through the shell of words" to find that the disputed lease was one intended for security. *Id.* at 598.

[8] Congress was not blind to the economic realities which have led to the use of a lease as a financing device or as collateral security. The legislative history to section 502 of the Code, which limits the damages which a landlord may claim, makes clear the Congressional intention that the limitation be applied to only true leases, with the determination that a lease is a true one to turn of the

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15 The distinction has been similarly explored in the personal property context. *See* I. Jones, *Lease or Secured Transaction–The Saga Continues Under the Bankruptcy Act*, Comm.L.J. 281 (June/July 1985) and cases cited therein; *In re Mesa Refining Inc.*, 52 B.R. 359 (Bankr.D.Colo. 1985); *In re Ram Manufacturing, Inc.*, 56 B.R. 769 (E.D.Pa. 1985), *Pacific Express, Inc. v. Teknekron Infoswitch Corp. (In re Pacific Express, Inc.)*, 780 F.2d 1482 (9th Cir. 1986); *The Bank of New York v. Olympia & York Florida Equity Corp. (In re Holywell Corp.)*, 51 B.R. 56 (S.D.Fla. 1985).

circumstances of each case and the economic substance of the transaction, not on the locus of title, form of transaction or the mere labelling as a lease. *See* 124 Cong.Rec.H. 11, 093-94 (Sept. 28, 1978); S 17, 410 (Oct. 6, 1978). After a review of the pertinent documents and undisputed facts, the conclusion that 48th Street's assignment of its Lease to ISH was for collateral purposes is inescapable. *See Cobham Enterprises, supra,* slip op. at 6-7, (Judge Buschman noting that the giving of a Lease as security is "so typical of sales of restaurants in New York"); *see also Anjo Restaurant Corp. v. Sunrise Hotel Corp.,* 98 Misc.2d 597, 414 N.Y.S.2d 265 (Sup.Ct.Nass.Co. 1979). Interestingly, the landlord does not really quarrel with the conclusion but instead asserts that it should not be bound by the transactions between 48th Street and ISH because of its ignorance of those transactions. Its protrayal of the unknowing landlord is unconvincing. To highlight, we turn now to the facts.

On the very *same day*, the landlord executed: 1) the Lease to 48th Street; 2) the Assignment allowing 48th Street to assign that Lease to ISH and requiring the landlord to permit a reassignment back to its original tenant whenever ISH and 48th Street so requested; and 3) a consent to allow ISH to sublease the premises back to 48th Street. Significantly, the Assignment to which the landlord consented did not release 48th Street from its contractual obligations under the Lease yet the escrowed reassignment (the form of which was required by the landlord in the Assignment) did release ISH, leading one to conclude that the landlord surely intended its association with ISH to be temporary with 48th Street remaining as its actual tenant. Moreover, in the consent to sublease the landlord provided that the two majority shareholders of 48th Street remain the same, breach of which covenant would revoke the consent. Consonant with our

reading of the unambiguous documents are the facts that ISH never took possession of the premises and never paid rent. For the past ten years, it has been 48th Street which has performed under the Lease. Thus, the landlord's claim that, in its eyes, ISH was its real tenant comes ten years too late and flies in the face of the documents which it executed.

That the landlord may not have been privy to the finer points of the sale of the restaurant business, including the terms of the actual sublease, is of no great moment, for the transactions which the landlord facilitated and in which it participated paint a picture of the relations among the parties. Although the landlord surprisingly did not cite us to *Anjo Restaurant Corp. v. Sunrise Hotel Corp., supra,* 98 Misc.2d 597, 414 N.Y.S.2d 265, there is no support there for an argument that a landlord who has no knowledge of the continuing relationship between an assignor and assignee of a lease is not bound by the provision in a security agreement between those parties which allows the assignor to reenter the premises upon the assignee's default and obtain a reassignment of the Lease. But the *Anjo* court made clear its determination was predicated upon three factors, none of which is present here, first, that the landlord's consent to a future reassignment was never obtained (the consent to assignment providing, in fact, that any future assignment would require the landlord's written consent), second, that the landlord was not made aware of the existence of the security agreement between the assignor and assignee which purported to grant the rights to reenter and obtain a reassignment, and third, that the landlord had no knowledge that the assignor claimed to be an interested party. Careful review of *Anjo*

serves to reinforce our conclusion that 48th Street is the equitable owner of the Lease.[16]

Federal Rule of Civil Procedure 56, made applicable to adversary proceedings by virtue of Fed.R.Bankr.P. 7056, provides for the granting of summary judgment where there exists no genuine issue of material fact and the moving party is entitled to such judgment as a matter of law. *Beyah v. Coughlin*, 789 F.2d 986 (2d Cir. 1986); *Nahtel Corporation v. West Virginia Pulp & Paper Co.*, 141 F.2d 1 (2d Cir. 1944). The material facts are undisputed. The documents are unambiguous. The intent is clear. *Cf. Bank of America National Trust and Savings Association v. Gillaizeau*, 766 F.2d 709 (2d Cir. 1985). Because the attempted termination of the Lease was without effect and because the assignment was one made as collateral, 48th Street was and remains the equitable owner of the Lease. Accordingly we grant 48th Street's motion for summary judgment in full and deny the landlord's cross motion for partial summary judgment.

IT IS SO ORDERED.

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16 Resolution of this tenancy issue is no doubt intended to form the necessary underpinning for eventual lease assumption under 365 of the Code. But the parties may have travelled a needlessly long route. For in categorizing 48th Street as a *sublessee*, the landlord conveniently ignores the debtor's status as the original tenant under and assignor of the Lease. While lease assignment terminates privity of estate, it does not affect privity of contract, 34 N.Y.Jur. *Landlord and Tenant* § 243 (1964), particularly where, as here, there has been no release. *Id.* at §§ 241, 243. And privity of contract alone gives rise to eligibility to assume a lease, *Allied Technology, Inc. v. R.B. Brunemann & Sons, Inc. (In re Allied Technology, Inc.)*, 25 B.R. 484, 494 (Bankr.S.D.Ohio 1982), especially where the debtor has been in possession of the premises for a continuous ten year period.